STATE OF MICHIGAN IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,	Supreme Court No.	
Plaintiff-Appellant	Court of Appeals No. 325883	
v GARY MICHAEL TRAVER,	Mackinac Circuit Court No. 2012-003474-FH	
Defendant-Appellee		

THE PEOPLE OF THE STATE OF MICHIGAN'S APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

			$\underline{\mathbf{P}}_{\mathbf{E}}$	age
Inde	x of Au	thorit	ies	ii
State	ement o	of Juri	isdiction	. iv
State	ement o	of Que	estions Presented	v
Rule	s Invol	ved		vi
Intro	duction	n		1
State	ement o	of Fac	ts and Proceedings	2
Argu	ment			8
I.	A defendant waives any claims of error by agreeing to the jury instructions as presented. Further, trial courts are not required to read jury instructions aloud, and the issuance of imperfect jury instructions is not a structural error.			
	A.	Standard of Review		
	В.	Analysis		9
		1.	The Court of Appeals ignored defense counsel's waiver	. 10
		2.	Jury instructions may be issued in oral or written form	. 11
		3.	The felony-firearm instructions fairly presented the issues to be tried and adequately protected Traver's rights	. 16
II.	A defendant must establish the factual predicate of his ineffective-assistance-of-counsel claim to merit relief			. 19
	A.	Standard of Review		
	В.	Analysis		. 19
		1.	Defendants face a heavy burden to demonstrate ineffective assistance of counsel	. 20
		2.	Traver fails to establish the factual predicate of his claim and demonstrate prejudice.	. 21
Conc	lusion	and R	elief Requested	. 23

INDEX OF AUTHORITIES

	Page
Cases	
Lafler v Cooper, 132 S Ct 1376 (2012)	20
People v Alexander, 234 Mich App 665 (1999)	21
People v Buie, 285 Mich App 401 (2009)	12, 14
People v Carines, 460 Mich 750 (1999)	9
People v Clark, 274 Mich App 248 (2007)	12
People v Douglas, 496 Mich 557 (2014)	20
People v Duncan, 462 Mich 47 (2000)	16, 18
People v Ginther, 390 Mich 436 (1973)	19
People v Heft, 299 Mich App 69 (2012)	19
People v Kowalski, 489 Mich 488 (2011)	passim
People v Pickens, 446 Mich 298 (1994)	20
Strickland v Washington, 466 US 668 (1984)	

Statutes

MCL 600.232	iv
MCL 750.227b	iv
MCL 750.82	iv
MCR 2.512	12, 13, 14
MCR 2.513	12, 13, 14, 15
MCR 7.303	iv

STATEMENT OF JURISDICTION.

A Mackinac County jury convicted defendant Gary Michael Traver of one count of assault with a dangerous weapon (felonious assault), MCL 750.82, and of one count of possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b. Traver timely appealed as of right to the Michigan Court of Appeals. In a 2-1 published opinion, the Court of Appeals reversed Traver's convictions and sentences and remanded for a hearing regarding ineffective assistance of counsel under *People v Ginther*, 390 Mich 436 (1973). *People v Traver*,

___ Mich App ___ (2016); 2016 WL 4129329; slip op, p 9.

The People now apply for leave to appeal from that order under MCR 7.303(B)(1) and MCL 600.232.

STATEMENT OF QUESTIONS PRESENTED

1. Does Michigan law require that all jury instructions be read aloud?

Appellant's answer: No.

Appellee's answer: Yes.

Trial court's answer: The trial court did not answer.

Court of Appeals' answer: Yes.

2. Does defense counsel waive any claims of error in the jury instructions by expressly and repeatedly agreeing to them in their final form, including that some instructions were written versus spoken and that the felony-firearm instruction was imperfect?

Appellant's answer: Yes.

Appellee's answer: No.

Trial court's answer: The trial court did not answer.

Court of Appeals' answer: No.

3. Does a defendant establish the factual predicate of his ineffective-assistance-of-trial-counsel claim regarding counsel's lack of advice on a certain crime before a guilty-plea withdrawal when that crime had not yet been charged?

Appellant's answer: Yes.

Appellee's answer: No.

Trial court's answer: The trial court did not answer.

Court of Appeals' answer: Yes.

RULES INVOLVED

MCR 2.512(B) states:

- (1) At any time during the trial, the court may, with or without request, instruct the jury on a point of law if the instruction will materially aid the jury in understanding the proceedings and arriving at a just verdict.
- (2) Before or after arguments or at both times, as the court elects, the court shall instruct the jury on the applicable law, the issues presented by the case, and, if a party requests as provided in subrule (A)(2), that party's theory of the case.

MCR 2.513 states, in pertinent parts:

(A) After the jury is sworn and before evidence is taken, the court shall provide the jury with pretrial instructions reasonably likely to assist in its consideration of the case. Such instructions, at a minimum, shall communicate the duties of the jury, trial procedure, and the law applicable to the case as are reasonably necessary to enable the jury to understand the proceedings and the evidence. The jury also shall be instructed about the elements of all civil claims or all charged offenses, as well as the legal presumptions and burdens of proof. The court shall provide each juror with a copy of such instructions. MCR 2.512(D)(2) does not apply to such preliminary instructions.

* * *

(N)(1) Before closing arguments, the court must give the parties a reasonable opportunity to submit written requests for jury instructions. Each party must serve a copy of the written requests on all other parties. The court must inform the parties of its proposed action on the requests before their closing arguments. After closing arguments are made or waived, the court must instruct the jury as required and appropriate, but at the discretion of the court, and on notice to the parties, the court may instruct the jury before the parties make closing arguments. After jury deliberations begin, the court may give additional instructions that are appropriate.

* * *

(N)(3) *Copies of Final Instructions*. The court shall provide a written copy of the final jury instructions to take into the jury room for deliberation. Upon request by any juror, the court may provide

additional copies as necessary. The court, in its discretion, also may provide the jury with a copy of electronically recorded instructions. [Emphasis in original.]

INTRODUCTION

The Court of Appeals' published decision in this case introduces three errors into Michigan law. First, it held that a trial court necessarily commits reversible error if it fails to read all jury instructions aloud. Yet no Michigan statute, court decision, or court rule carries such a requirement. Because Michigan law does not require an oral reading of the instructions, it was not an error, let alone a reversible one, to instruct the jury by reading some instructions aloud while supplying others, specifically the elements for the charges, in written form.

Second, it ignores the principle that "by expressly and repeatedly approving the jury instructions on the record, [a] defendant waive[s] any objection to [] erroneous instructions, and there is no error to review"—"waiver has extinguished any error." *People v Kowalski*, 489 Mich 488, 504, 503 (2011). Here, the defendant said he was satisfied with the instructions *three* times, but the Court of Appeals nonetheless concluded there was "plain error." *Traver*, slip op, p 7. This holding directly contravenes *Kowalski*.

Third, by stating that it did not need to "resort to ineffective assistance of counsel principles to circumvent the potential waiver issues," the Court of Appeals failed to examine whether the failure to object to the instructions satisfied the second prong of any ineffective-assistance claim—that counsel's performance somehow prejudiced the defendant. Allowing this published opinion to stand would distort basic principles of appellate review and would overturn a jury without any evaluation of whether the defendant suffered any prejudice from the instructions. These significant changes to Michigan law warrant this Court's review.

The Court of Appeals made additional mistakes. It also erred in holding that the trial court entirely failed to instruct the jury on the elements of felony firearm, constituting a structural error requiring reversal. But that is not the case, as the jury received instructions on both of the elements, albeit imperfectly, in both spoken and written form.

Finally, Traver fails to establish the factual predicate of his ineffective-assistance-of-counsel claim: while he alleges counsel should have advised him on the penalty for felony firearm *before* he withdrew his guilty plea, that charge was not filed until *after* he had already withdrawn his plea.

Thus, this Court should grant leave to appeal, adopt Judge Sawyer's dissent below, and reverse.

STATEMENT OF FACTS AND PROCEEDINGS

Traver threatens to shoot his neighbor if he touches his car.

Patrick Richard St. Andre had been next-door neighbors with Traver for a decade. (11/12/14 Trial Transcript [TT], p 50.) On the evening of November 11, 2012, St. Andre went to Traver's trailer, and the two men had an argument about Traver parking his car on St. Andre's property. (TT, pp 51-52.) Traver threatened to shoot St. Andre if he touched Traver's car; St. Andre called 911. (TT, p 52.)

Mackinac County Sherriff's Deputy Joe Bommarito responded to the call. (TT, p 107). He spoke to St. Andre and Traver about the property-line dispute, and it seemed to be resolved, but he told them if they had any further problems they should call the police and not resort to violence. (TT, pp 107-108.)

Traver resorts to violence.

The next morning, St. Andre re-parked his car next to Traver's because St. Andre was still upset and frustrated about being bullied on his own property. (TT, p 54.) St. Andre sometimes blocked the driveway with a wire cable, but he never intended to block Traver. (TT, pp 65-66.) Traver had never been violent or threatened him in the past about the dispute. (TT, p 74.)

After St. Andre re-parked his car, Traver opened the bedroom window of his trailer and exchanged angry words with St. Andre. (TT, p 54.) Traver then stuck his arm out of the window waving a gun and said, "How do you like this?" (TT, p 54.) St. Andre quickly retreated to his cabin and called 911. (TT, p 57.) He was on the phone with 911 dispatch—about 10 feet from his porch—when Traver came around the corner waving the gun.¹ (TT, pp 57-61.)

Traver yelled at St. Andre, grabbed his phone, threw it to the ground, and then grabbed him by the shoulders and shoved him to the ground several times all while waving the gun in his right hand. (TT, pp 57-61, 79-81.) Based on Traver's behavior and angry demeanor, St. Andre was frightened that Traver would shoot him. (TT, pp 61-63.) The whole incident happened very quickly. (TT, pp 81-83.)

¹ The 911 recording of the incident was played for the jury, and St. Andre testified that the person screaming was Traver. (TT, pp 62-63.) The 911 recording was entered into evidence as People's Exhibit 2. (TT, p 63.)

Other witnesses report what they saw and heard.

St. Andre's friend, James Carrico, witnessed the altercation. (TT, pp 61, 77, 81.) That morning, he awoke to Traver and St. Andre arguing. (TT, p 88.) From the front door of St. Andre's cabin he saw Traver with his arm around St. Andre's neck or chest while waving a handgun. (TT, p 89.) Traver looked right at Carrico and said, "[Y]ou better get your boy in line or shit's gonna happen." (TT, p 89.) Traver flung St. Andre to the ground several times. (TT, p 90.) Carrico was afraid that either he or St. Andre were going to be shot. (TT, p 91.) The whole incident took less than a minute. (TT, p 94.)

Steven Collingwood testified that he knew Traver from performing jobs for him and that he was at Traver's home on the date of the incident. (TT, p 97.) Collingwood awoke to Traver and St. Andre arguing. (TT, p 97.) Traver went out one door, and Collingwood went out another door. (TT, pp 99, 104.) He did not see Traver with a gun, and he did not see him grab or throw St. Andre; he only heard them arguing. (TT, pp 99-100, 104.)

The police respond, finding Traver with a gun.

Michigan State Police Trooper Fred Strich was the first officer to make contact with Traver, who was then leaning against the trunk of a light blue Lincoln parked in the driveway. (TT, pp 137-138.) Trooper Strich ordered Traver to put his hands in the air; when Traver complied, Trooper Strich saw the butt of a gun sticking out of Traver's right rear pocket. (TT, p 138.) Traver admitted to Strich that he and St. Andre argued and that he had displayed the gun to St. Andre. (TT,

p 144.) Traver also admitted he went over to St. Andre's cabin, but denied knocking the phone out of St. Andre's hand, interrupting the 911 call, taking the gun with him, or having any physical altercation with St. Andre. (TT, p 144.)

Deputy Darrel Sadler of the Mackinac County Sherriff's Office also responded to St. Andre's 911 call. (TT, p 111.) Traver told him the incident was a civil dispute over property lines; he admitted that he held a gun up from inside his house, but said he did not take it outside his house or point it at anyone. (TT, p 113.)

Deputy Edward Wilk of the Mackinac County Sherriff's Office was also dispatched to the scene. (TT, p 114.) He heard Strich order Traver to put his hands in the air, and he saw a gun in Traver's back right pants pocket or waistband. (TT, pp 117-118.) He approached Traver, removed the handgun, and unloaded the ammunition.² (TT, p 118.)

Traver denies assaulting St. Andre or possessing his gun outside his home.

Traver testified at trial in his own defense. (TT, p 153.) He testified that the driveway dispute had been going on for about one year and that three times in the past year St. Andre blocked the driveway with a wire. (TT, p 156.) Traver testified that, on the morning of the incident, St. Andre woke him up yelling and screaming through his bedroom window and that Traver could have touched St. Andre through the window. (TT, p 158.)

 $^{^{\}rm 2}$ The gun and ammunition was marked as People's Exhibits 3 and 4. (TT, pp 119-120.)

Traver testified that he pulled out his "Glock 40," the gun he kept by his bed, opened his window, and told St. Andre to get away from the window. (TT, pp 158-159.) He denied pointing the gun or threatening anyone with the gun. (TT, pp 158-159, 165-166.) He said he went out of his cabin and saw St. Andre, who walked towards him with his hand out in front of him and a phone in his hand, which he put in Traver's face. (TT, p 160.) Traver admitted that he knocked the phone out of St. Andre's hand. (TT, pp 160-161.) But Traver denied taking the gun with him; he said he left it by his bed. (TT, p 161.) The two argued, and the whole encounter lasted 20 seconds, after which Traver went back to his trailer. (TT, p 162.)

Traver testified that on the way back to his trailer he noticed St. Andre's car blocking his car and that he called a towing company to have it towed. (TT, p 163.)

After calling the towing company, Traver grabbed his gun and put it in his back pocket in case there were problems when the wrecker arrived. (TT, p 163.)

On cross-examination, Traver admitted he heard most of the 911 recording and that it was his voice that was yelling and screaming. (TT, p 166.) He said that he had a right to protect himself and his property and that the reason he pulled the gun out was because St. Andre woke him up, was yelling and screaming through his window, and was insulting Traver's deceased mother. (TT, p 170.)

The jury convicts Traver of felonious assault and felony firearm.

The jury convicted Traver of one count of assault with a dangerous weapon (felonious assault) and of one count of possession of a firearm during the commission of a felony (felony firearm). (TT, p 200.) The jury acquitted Traver of

one count of carrying a concealed weapon and of one count of interfering with electronic communications. (TT, p 200.)

The trial court sentenced Traver to two years' imprisonment on the felony-firearm conviction and credit for time served on the felonious-assault conviction. (12/18/14 Sentencing Tr, p 15.)

Prior to trial, Traver had pled guilty but later withdrew his plea.

During a circuit-court pretrial hearing, a plea agreement was placed on the record wherein Traver would plead guilty to brandishing a firearm and carrying a concealed weapon. (7/18/13 Plea Hr'g Tr [PH], pp 5-6.) The parties discussed the effect the plea would have on Traver's ability to continue as a medical-marijuana caregiver. (PH, p 4.) The parties noted on the record that the spirit of the plea was to allow Traver to continue as a caregiver. (PH, pp 6-7.) The court recessed to allow defense counsel to research the topic. (PH, p 5.) When the proceeding resumed, Traver pled guilty consistent with the plea agreement. (PH, pp 8-16.)

On September 19, 2013, the matter resumed for sentencing. (9/9/13 Pretrial and Motion to Withdraw Plea Hr'g Tr [MT], p 1.) Traver had new counsel, who had filed a motion to withdraw Traver's plea, arguing that the plea impacted his ability to be a medical-marijuana caregiver and because Traver maintained his innocence, relatedly contending that the elements for brandishing were not met at the plea hearing. (MT, pp 3-9.) The court granted the motion to allow Traver to withdraw his plea, citing Traver's desire to "continue to put forth his innocence." (MT, p 9.)

During that same motion hearing but *after* the plea was already withdrawn, the prosecutor stated that he would likely amend the information to add a charge of felony-firearm. (MT, p 10.) Defense counsel did not object and only clarified whether that would entitle Traver to another preliminary examination. (MT, p 10.)

The prosecutor amended the information on September 27, 2013 to include one count of felony firearm. (12/19/13 Pretrial Hr'g Tr, p 3.) Defense counsel took no action against the amendment.

During a subsequent pretrial hearing on May 9, 2014, at which Traver had yet another new attorney due to his previous attorney withdrawing (4/14/14 Motion to Withdraw Hr'g Tr, p 8), the prosecutor noted on the record that Traver had declined three additional plea offers since April 16, 2014. (5/9/14 Pretrial Hr'g Tr, p 3.) Thus, the prosecutor stated, the matter was ready to be set for trial. (5/9/14 Pretrial Hr'g Tr, p 3.)

ARGUMENT

I. No reversible error occurred because a defendant waives any claims of error by agreeing to the jury instructions as presented, because trial courts are not required to read jury instructions aloud, and because the issuance of imperfect jury instructions is not a structural error.

A. Standard of Review

Counsel waived any errors related to the jury instructions. Waiver eliminates any error and precludes appellate review. *People v Kowalski*, 489 Mich 488, 504 (2011).

The Court of Appeals did not follow the foregoing waiver rule. Instead, it examined an extinguished error using the plain-error framework. Under plain-error review, unpreserved claims of instructional error are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 761-765 (1999). Plain-error review has three requirements: (1) an error must have occurred, (2) the error must be plain, and (3) the error must have affected the defendant's substantial rights, which generally requires the defendant to show that the error affected the outcome of the lower-court proceedings. *Id.* at 763. But even if those three elements are met, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error 'seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.* The error here, even if not extinguished, did not meet this standard.

B. Analysis

Waiver extinguishes any error. In this case, defense counsel extinguished any errors in the jury instructions by expressly and repeatedly agreeing to them, save for one clarification, after which he again acquiesced in them. But the Michigan Court of Appeals failed to address the People's waiver argument below. Rather, the Court of Appeals held in a published opinion that a trial court necessarily reversibly errs if it fails to read all jury instructions aloud. The Court of Appeals also erred in holding that the trial court entirely omitted the elements of

the felony-firearm instruction, which was not the case. Thus, this Court should adopt the dissent and reverse.

1. The Court of Appeals ignored defense counsel's waiver.

The Court of Appeals first erred in failing to address the People's argument that defense counsel waived any errors regarding the jury instructions. Rather, the Court of Appeals addressed Traver's instructional claims solely on the merits, even though the waiver precluded any appellate review.

A waiver is the "intentional relinquishment or abandonment of a known right." *Kowalski*, 489 Mich at 503 (internal citation and quotation marks omitted). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *Id.* (internal citation and quotation marks omitted). "When defense counsel clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver." *Id.*

Here, defense counsel agreed with the instructions three times, save for one clarification. First, after the preliminary instructions, the trial court asked both the prosecutor and defense counsel if they were "satisfied with the same," to which both attorneys responded in the affirmative. (TT, p 11.)

Second, when the court asked the prosecutor and defense counsel if they had "[a]ny issue with the [final] instructions," defense counsel stated:

I guess, yeah. Your Honor, I have a – a problem with count four [felony firearm]. I don't think it makes it's [sic] clear that there has to be an underlying felony before count four – they could find anybody guilty of count four. [TT, pp 196-197.]

The court and prosecutor agreed such a clarification was necessary, so the court instructed the jurors: "If you do find the defendant guilty in count one, two, or three and understand, in your belief, that a weapon was used to commission [sic] those crimes, then count four would be applicable." (TT, p 197.) The court then asked the attorneys if they were satisfied, to which they responded in the affirmative. (TT, pp 197-198.)

Third, after the jury left to deliberate the trial court again asked the attorneys if they were satisfied with the final instructions. (TT, p 199.) The trial court had issued some instructions orally and some instructions in written form. (TT, pp 187-198.) Both the prosecutor and defense counsel responded identically to the court's inquiry: "Yes, your Honor." (TT, p 199.)

These express and repeated affirmations from defense counsel waived any error in the instructions, as Judge Sawyer noted in his dissent in this case. *Traver*, slip op, p 1 (Sawyer, J., dissenting). Thus, as in *Kowalski*, "[t]he Court of Appeals erred when it failed to address the prosecution's claim that defendant waived the instructional error." 489 Mich at 504. With counsel's waiver extinguishing any errors, appellate review of Traver's instructional claims is precluded.

2. Jury instructions may be issued in oral or written form.

Even if the Court of Appeals had not erred by bypassing defense counsel's waiver, it still would have erred in its plain-error review of Traver's claims. The

first of Traver's two instructional claims arise from the trial court's reading of some instructions aloud and issuing some instructions only in written form. In addressing this claim, the Court of Appeals determined that the trial court reversibly erred in failing to read all of the instructions aloud. *Traver*, slip op, p 7. But because no such rule for oral instructions exists in Michigan, there was no plain error affecting Traver's substantial rights: this Court should adopt the dissent and reverse.

The Court of Appeals cited two court rules to support their holding: MCR 2.512 and 2.513. While the court explicitly acknowledged that "[n]either specifically states that the instructions must be oral," the court still concluded that "both contemplate that instructions must always be spoken, at least in the first instance." *Traver*, slip op, p 4. But the court was correct the first time. Neither rule, nor any other rule, requires that instructions be "oral" or "spoken."

Court rules are subject to the same interpretation principles as statutes. People v Clark, 274 Mich App 248, 252 (2007). "To begin interpreting a court rule, the first step is to consider the language of the rule." People v Buie, 285 Mich App 401 (2009). "If the language of the court rule is clear and unambiguous, then no further interpretation is required or allowed." Id. (internal citation and quotation marks omitted). "[W]hen reasonable minds can differ on the meaning of the language of the rule, then judicial construction is appropriate." Id. (internal citation and quotation marks omitted).

MCR 2.512(B) addresses when the court may or should issue instructions to the jury, and it says nothing about requiring jury instructions to be spoken aloud:

- (1) At any time during the trial, the court may, with or without request, instruct the jury on a point of law if the instruction will materially aid the jury in understanding the proceedings and arriving at a just verdict.
- (2) Before or after arguments or at both times, as the court elects, the court shall instruct the jury on the applicable law, the issues presented by the case, and, if a party requests as provided in subrule (A)(2), that party's theory of the case.

MCR 2.513 also addresses, in part, the manner in which the jury is instructed. For example, MCR 2.513(A) states the following for preliminary instructions, again with words that say nothing to require the instructions to be read aloud:

After the jury is sworn and before evidence is taken, the court shall provide the jury with pretrial instructions reasonably likely to assist in its consideration of the case. Such instructions, at a minimum, shall communicate the duties of the jury, trial procedure, and the law applicable to the case as are reasonably necessary to enable the jury to understand the proceedings and the evidence. The jury also shall be instructed about the elements of all civil claims or all charged offenses, as well as the legal presumptions and burdens of proof. The court shall provide each juror with a copy of such instructions. MCR 2.512(D)(2) does not apply to such preliminary instructions.

MCR 2.513(N) addresses jury instructions as well. That rule states that "[a]fter closing arguments are made or waived, the court must instruct the jury as required and appropriate, but at the discretion of the court, and on notice to the parties, the court may instruct the jury before the parties make closing arguments." MCR 2.513(N)(1). The rule goes on to say, still without any mention of reading the instruction aloud, that "[a]fter jury deliberations begin, the court may give

additional instructions that are appropriate." *Id.* Finally, MCR 2.513(N)(3) states that "[t]he court shall provide a written copy of the final jury instructions to take into the jury room for deliberation," and that additional written or electronic instructions may be provided upon request.

None of these rules require oral or spoken instructions. MCR 2.512(B) only uses the word "instruct." MCR 2.513(A) says "communicate," and MCR 2.513(N) uses the words "instruct" and "give." The plain and ordinary meaning of these terms is that the trial court must impart the jury's duties to them in some way, whether that be spoken, written, signed, or some combination of these or other communicative mediums. Because the terms used in MCR 2.512 and 2.513 are plain and unambiguous, and do not require oral instructions, any further interpretation is neither required nor allowed. *Buie*, 285 Mich App at 416.

The Court of Appeals consulted dictionary definitions of "instruct," as well as their own definition of "teach." *Traver*, slip op, pp 5-6. The court consulted the Merriam-Webster's Collegiate Dictionary, which defined "instruct" as "to give knowledge to: teach, train," "to provide with authoritative information or advice," or "to give someone an order or command." *Id.* That definition did not mention any oral element. The court then distinguished "instructions," as possibly being provided in written form, from "instruct," which "signaled that a trial judge would orally 'teach' the jury the law." *Id.* at 6. The court then asserted that "[t]eaching almost always begins as a verbal experience." *Id.*

But these definitions do not support the majority's holding that a trial court's failure to read jury instructions aloud necessarily constitutes reversible error. As with the court rules, these definitions do not specify that to "instruct" or "teach" mean to speak or orally communicate. Instructing and teaching often rely on the written word, e.g., books. Certainly that is not the only way to teach, just as to speak is not the only way to teach. But that is the point: no one way is required by either the court rules or the dictionary. The trial court may use its discretion—guided by a party's requests and acquiescence—to instruct the jury as appropriate.

Finally, the Court of Appeals reasoned that instructions must be oral because otherwise the written-copy portion of MCR 2.513(N)(3) would be rendered surplusage. Not so. That rule states the court must provide a written copy of the final instructions for the jurors "to take into the jury room for deliberation." MCR 2.513(N)(3). This rule merely makes a written copy of the instructions—which may already be provided in written form *during trial*—available for the jurors to use *during deliberations*, rather than having to rely on their memory from review in the courtroom prior to deliberations. In other words, the notions are not mutually exclusive—to have written instructions either in the courtroom *or* in the jury room—such that MCR 2.513(N)(3) becomes nugatory.

In sum, the law does not command the Court of Appeals' new rule that a trial court's failure to orally instruct the jury on all instructions per se constitutes reversible error. Moreover, this new rule seems to preclude counsel from waiving any alleged error in this regard, given the court's treatment of the waiver in this

case. Accordingly, this Court should adopt Judge Sawyer's reasoning in his dissent and reverse.

3. The felony-firearm instructions fairly presented the issues to be tried and adequately protected Traver's rights.

Traver's second claim of error on which the Court of Appeals granted relief was that the trial court failed to instruct the jury on the elements of felony firearm. While the element instructions may have been imperfect, the jury did receive the elements of felony firearm and, read as a whole, the instructions fairly presented the issues to be tried and adequately protected Traver's rights, as Judge Sawyer found in his dissent. *Traver*, slip op, p 3-4 (Sawyer, J., dissenting). Accordingly, to the extent that there was any error, it did not affect Traver's substantial rights. Indeed, the evidence showed that Traver possessed a firearm during the commission of a felony. Thus, this Court should adopt the dissent, with the following additional reasoning, and reverse.

To be sure, *complete* failure to instruct the jury on any of the elements of an offense is a structural error requiring reversal. *People v Duncan*, 462 Mich 47, 57 (2000). But "[i]nstructional errors that omit an element of an offense, or otherwise misinform the jury of an offense's elements, do not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Kowalski*, 489 Mich at 501 (emphasis in original; internal citation and quotation marks omitted). "Accordingly, an imperfect instruction is not grounds for

setting aside a conviction if the instruction fairly presented the issues to be tried and adequately protected the defendant's rights." *Id.* at 501-502.

Here, the jury did receive instructions on both elements of felony firearm, albeit imperfectly. This is not a case where all elements were omitted from the instructions. First, it is helpful to note the Model Criminal Jury Instructions for felony firearm:

First, that the defendant committed [or attempted to commit] the crime of ______, which has been defined for you. It is not necessary, however, that the defendant be convicted of that crime.

Second, that at the time the defendant committed [or attempted to commit] that crime [he / she] knowingly carried or possessed a firearm. [M Crim JI 11.34.]

In this case, the trial court issued the final instructions orally, in part, and written, in part. (TT, pp 187-198.) For example, the court orally instructed the jury that the prosecution had to prove all elements of each charged offense beyond a reasonable doubt. (TT, pp 188-189.) The court also provided the element instructions in written form. The court stated, "You've already received the charges and the elements of the same," referring to written elements they received during the preliminary instructions. (TT, pp 34, 192.) The Court of Appeals included images of those written instructions in the majority opinion. *Traver*, slip op, pp 3-4.

Admittedly, as the majority noted, the written instruction for the felony-firearm charge stated only the model instruction for the definition of possession related to the charge, rather than the model instructions on the elements noted above. See CJI2d 11.34a. But contrary to the majority opinion, this did not completely omit the elements, rendering this a structural error. Rather, the

elements were merely presented somewhat imperfectly, bringing this case under *Kowalski*, not *Duncan*.

The jurors received the instruction on the first element orally. When the trial court finished reading the final instructions and asked if both parties were satisfied, defense counsel requested a clarification on the felony-firearm instruction, noting that "there has to be an underlying felony before . . . they could find anybody guilty of count four." (TT, pp 196-197.) The court agreed and instructed the jury on what was essentially the first element of felony firearm, stating, "If you do find the defendant guilty in count one, two, or three and understand, in your belief, that a weapon was used to commission [sic] those crimes, then count four would be applicable." (TT, p 197.)

The definition-of-possession instruction essentially instructed the jury on the second element of felony firearm: that Traver must have possessed the firearm. While the manner of presenting that element was imperfect, the jury was still instructed that they had to find that Traver possessed the firearm to convict him of felony firearm. This "fairly presented the issues to be tried and adequately protected the defendant's rights." *Kowalski*, 489 Mich at 501-502.

Thus, viewing the instructions as a whole, both oral and written, the jurors were instructed that they had to find beyond a reasonable doubt that (1) Traver committed an underlying felony (2) while possessing a firearm, to convict him of felony firearm. And given St. Andre's and his friend's testimony that Traver physically assaulted St. Andre while holding his gun, the jury properly determined

that both elements were satisfied in finding him guilty of felony firearm. (TT, pp 57-61, 79-81, 88-91.)

Consequently, even if the instructions were erroneous, they did not affect Traver's substantial rights. This Court should therefore adopt the dissent and reverse the Court of Appeals' decision on this issue.

II. A defendant must establish the factual predicate of his ineffective-assistance-of-counsel claim to merit relief.

A. Standard of Review

This claim is not preserved as Traver did not file a motion for a new trial or a hearing under *People v Ginther*, 390 Mich 436 (1973). Accordingly, this Court's review is limited to errors apparent on the record. *People v Heft*, 299 Mich App 69, 80 (2012).

B. Analysis

Traver also contends that his trial counsel rendered ineffective assistance by failing to advise him before he withdrew his initial guilty plea that a conviction for felony firearm carries a mandatory two-year prison term. But as the dissent found, Traver fails to establish the factual predicate of his claim. The prosecutor did not add the felony-firearm charge until *after* Traver withdrew his plea. Thus, counsel could not have advised Traver regarding the charge *before* he withdrew his plea. Moreover, Traver fails to demonstrate prejudice as he withdrew his plea based on his actual innocence. Consequently, this Court should adopt the dissent and reverse.

1. Defendants face a heavy burden to demonstrate ineffective assistance of counsel.

To establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that he was prejudiced as a result. Strickland v Washington, 466 US 668, 687-688, 692 (1984); see also People v Pickens, 446 Mich 298, 303 (1994). Because both prongs must be satisfied to establish ineffective assistance, if a defendant cannot satisfy one prong, the other need not be considered. *Id.* at 697.

"As at trial, a defendant is entitled to the effective assistance of counsel in the plea-bargaining process." *People v Douglas*, 496 Mich 557, 591-592 (2014), citing *Lafler v Cooper*, 132 S Ct 1376, 1384 (2012). The defendant must still show both *Strickland* prongs. *Id.* at 592. The performance prong remains the same in the plea-bargaining process as it does with trial: counsel's performance must have met an objective standard of reasonableness. *Id.* The defendant has the burden to establish the factual predicate of his claim. *Id.*

The prejudice prong, however, is different. The defendant must show that "the outcome of the plea process would have been different with competent advice." *Lafler*, 132 S Ct at 1384. If the defendant alleges that he rejected a plea offer based on counsel's erroneous advice, then the defendant must show that:

but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. [*Id.* at 1385.]

2. Traver fails to establish the factual predicate of his claim and demonstrate prejudice.

Traver must first show deficient performance. He does not do so. He claims that counsel did not inform him before he withdrew his guilty plea that felony firearm carries a mandatory penalty of two years' imprisonment, such that had he known of the penalty he would not have withdrawn his plea and proceeded to trial. But the felony-firearm charge was not added to the information until *after* Traver withdrew his guilty plea. Thus, counsel could not have misadvised him as to that charge.

Following his entry of a guilty plea to brandishing a firearm and carrying a concealed weapon, Traver's new counsel filed a motion to withdraw his plea based on two considerations: (1) the plea agreement impacted his ability to remain a medical-marijuana caregiver and (2) he was actually innocent of the charged crimes. (MT, pp 3-9.) Felony firearm had not yet been charged. The trial court granted Traver's motion to withdraw the plea based on his actual-innocence claim on September 19, 2013. (MT, p 1, 9.) *After* the plea had already been withdrawn, the prosecutor noted on the record that he would likely add a count four, felony firearm, to the information.³ (MT, p 10.) The prosecutor amended the information to include

³ Though Traver suggests otherwise, there is no evidence that Traver was *not* present for the hearing on counsel's motion to withdraw his plea. Indeed, it is highly likely that he was present as that was the date and time set for sentencing on his guilty plea. (MT, p 1.) Moreover, Traver has not rebutted the presumption of regularity that he was present. *People v Alexander*, 234 Mich App 665, 670 (1999). While Traver did state in his affidavit in the Court of Appeals that he was not present, he did not corroborate that with affidavits from anyone who was present. And, in any event, this point is moot given that the felony-firearm charge

the felony-firearm charge nearly three weeks later, on September 27, 2013. (12/19/13 Pretrial Hr'g Tr, p 3.)

Thus, with felony firearm not even being charged prior to Traver's plea withdrawal, counsel necessarily could not have performed deficiently by failing to advise Traver about the mandatory two-year prison term a conviction on that charge would carry. The charge simply was not at play when Traver withdrew his plea. Counsel was not required to foresee that the prosecutor would amend the information based on whether the plea was withdrawn and advise Traver accordingly. Hence, Traver has failed to establish the factual predicate of his claim, as the dissent found.

Moreover, Traver failed to demonstrate prejudice. As Judge Sawyer noted in his dissent, Traver withdrew his plea because he maintained his innocence. If that was the case, and it was already alleged in other charges that Traver possessed a firearm, the addition of a felony-firearm charge would not have dissuaded Traver from withdrawing his plea. *Traver*, slip op, p 5 (Sawyer, J., dissenting). If he did not actually commit the crimes, it would not have mattered that he faced a mandatory two-year prison term. In addition, the prosecutor noted in May 2014 that he had extended three other plea offers to Traver since April 2014, all of which Traver rejected. (5/9/14 Pretrial Hr'g Tr, p 3.) Certainly by that time Traver was aware of the felony-firearm charge and its penalty and could have accepted another

necessarily could not have impacted his decision to withdraw his plea as the charge was added *after* he withdrew his plea.

plea offer. But he did not. Thus, he cannot show any reasonable probability of a different outcome in the proceeding.

In sum, Traver fails to establish the factual predicate of his ineffectiveassistance claim and cannot demonstrate prejudice. This Court should therefore adopt the dissent and reverse.

CONCLUSION AND RELIEF REQUESTED

Wherefore, the People respectfully request that this Court grant the application for leave to appeal, adopt the dissent below, and reverse.

Respectfully submitted,

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